

Item W06-05 Response Form

Title: **Family Law: Ex Parte Communication in Child Custody Proceedings** (adopt California Rules of Court, rule 5.235)

- ☐ **Agree** with proposed changes
- ☐ **Agree** with proposed changes **if modified**
- ☐ **Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

Organization: _____

☐ **Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

Please **write** or **fax** or **respond using the Internet** to:

Address: Ms. Romunda Price,
Judicial Council, 455 Golden Gate Avenue,
San Francisco, CA 94102
Fax: (415) 865-7664 **Attention:** Romunda Price
Internet: www.courtinfo.ca.gov/invitationstocomment

DEADLINE FOR COMMENT: 5:00 p.m., Monday, January 23, 2006
--

Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

*Circulation for comment does not imply endorsement by the Judicial Council
or the Rules and Projects Committee
All comments will become part of the public record of the council's action.*

Invitation to Comment W06-05

Title	Family Law: Ex Parte Communication in Child Custody Proceedings (adopt California Rules of Court, rule 5.235)
Summary	<p>The proposed new Rule of Court, rule 5.235 would implement changes to the Family Code made by Senate Bill 1088 (Bowen, Stats. 2005, ch. 489), which limits ex parte communication between any court-connected or court-appointed mediator or evaluator and (1) the attorney for any party, (2) a court-appointed counsel for a child, and (3) the court.</p>
Source	<p>Family and Juvenile Law Advisory Committee Hon. Jerilyn L. Borack and Hon. Susan D. Huguenor, Co-chairs</p>
Staff	<p>Gabrielle D. Selden, 415-865-8085, gabrielle.selden@jud.ca.gov</p>
Discussion	<p>This proposal is for a new rule of court that would implement the mandate of SB 1088 (Bowen, Stats. 2005, ch. 489). This bill adds section 216 to the Family Code and requires the Judicial Council to adopt a rule of court by July 1, 2006.</p> <p>Family Code section 216 prohibits ex parte communication between court-connected or court-appointed mediators or evaluators, the attorney for any party, a court-appointed counsel for a child, and the court in any proceeding under the Family Code, except under specified circumstances.</p> <p>Under the statute ex parte communication is permitted (1) between the mediator, evaluator, attorney for any party, and the court if the parties so stipulate; (2) to allow a court-appointed counsel for a child to interview mediators and perform other duties under Family Code section 3151(c)(5), or as expressly authorized by the court; (3) when needed to schedule appointments; (4) to allow a mediator or evaluator to address a case involving allegations of domestic violence as stated in Family Code sections 3113, 3181, and 3192 and California Rules of Court rule 5.215; (5) if the mediator or evaluator determines that ex parte communication is needed to inform the court of his or her belief that a restraining order is necessary to prevent an imminent risk to the physical safety of the child or the party; (6) to allow a mediator or evaluator to perform his or her responsibilities either as a mandated reporter under Penal Code section 11165.9, or to warn under <i>Tarasoff v. Regents of the University of California</i> (1976) 17 Cal.3d 425, <i>Hedlund v. Superior Court</i> (1983) 34 Cal.3d 695, and section 43.92 of</p>

the Civil Code.

The proposed rule tracks Family Code section 216 by specifying which ex parte communication is prohibited and which is permitted in child custody proceedings under the Family Code.

Family Code section 216 does not define certain terms that are repeated throughout the statute such as “communication,” “ex parte communication,” “court-connected mediator or evaluator,” and “court-appointed mediator or evaluator.” The proposed rule includes definitions of these terms to clarify the subjects of the rules relating to ex parte communication. The definitions proposed have been developed to be consistent with legislative intent and to provide clarification for those subject to the rule.

In addition, the proposed rule specifies that the parties must enter into a written stipulation if they wish to allow ex parte communication in their case. However, the parties’ ability to stipulate is limited, and applies only to ex parte communication among their attorneys, mediators or evaluators, and the court. Consistent with Family Code section 216, stipulations are not permitted to include ex parte communication involving a court-appointed counsel for a child; instead, as under the statute, the court would need to provide express authorization for ex parte communication between court-appointed counsel for a child and mediators or evaluators unless one of the other exceptions in the proposed rule applied.

Also, the proposed rule adds two circumstances, not provided for in SB 1088, in which ex parte communication would be permitted. The first situation relates to the duty of mediators and evaluators to disclose any actual or potential conflict of interest or any dual relationships. (Cal. Rules of Court, rule 5.210 (h)(10) and 5.220 (h)(10)). The second circumstance relates to the responsibility the court may have to investigate complaints.

First, under the proposed rule, mediators and evaluators are allowed to communicate any such conflicts of interest or dual relationships on an ex parte basis. Including items (f)(2) and (f)(3) in the proposed rule addresses the situation in which mediators or evaluators need to disclose a potential or actual conflict of interest or dual relationship and may need to do so on an ex parte basis.

Second, under the proposed rule at item (g)(3), the court is allowed to engage in ex parte communication in order to investigate complaints (for example, about the performance of a mediator or evaluator), so that the court can comply with various legal requirements mandating a response to such complaints.

Finally, the proposed rule directs the courts to inform the parties, attorneys, mediators, and evaluators about the rules relating to ex parte communication.

The proposed rule is attached at pages 4–5. Senate Bill 1088 and Family Code section 216 can be found at pages 6-7.

Attachments

Rule 5.235 of the California Rules of Court would be adopted, effective July 1, 2006, to read:

Rule 5.235: Ex parte communication in child custody proceedings

(a) [Authority] This rule of court is adopted under article VI, section 6 of the California Constitution and Family Code section 216.

(b) [Purpose] Generally, ex parte communication is prohibited in legal proceedings. In child custody proceedings, Family Code section 216 recognizes specific circumstances in which ex parte communication is permitted between court-connected or court-appointed child custody mediators or evaluators and the attorney for any party, the court-appointed counsel for a child, or the court. This rule of court establishes mandatory statewide standards of practice relating to when, and between whom, ex parte communication is permitted in child custody proceedings.

(c) [Definitions] For purposes of this rule,

(1) “Communication” includes any verbal statement made in person, by telephone, by voicemail, or by video conferencing; any written statement, illustration, photograph or other tangible item, contained in a letter, document, e-mail, or facsimile; or other equivalent means, either directly or through third parties.

(2) “Ex parte communication” is a direct or indirect communication on the substance of a pending case without the knowledge, presence, or consent of all parties involved in the matter.

(3) “Court-connected evaluator or mediator” is an employee or independent contractor of the superior court, family court services division, who conducts child custody evaluations or mediations.

(4) “Court-appointed evaluator or mediator” is a professional in private practice appointed by the court to conduct a child custody evaluation or mediation.

(d) [Ex parte communication prohibited] In any child custody proceeding under the Family Code, ex parte communication is prohibited, except as provided by this rule.

(e) [Exception for parties’ stipulation] The parties may enter into a stipulation either in open court or in writing to allow ex parte communication between a court-connected or court-appointed evaluator or mediator and:

(1) The attorney for any party or

(2) The court.

42 **(f) [Ex parte communication permitted]** In any proceeding under the Family Code,
43 ex parte communication is permitted between a court-connected or court-appointed
44 evaluator or mediator and (1) the attorney for any party, (2) the court-appointed
45 counsel for a child, or (3) the court if necessary:

46
47 (1) To schedule appointments;

48
49 (2) To disclose any actual or potential conflicts of interest or dual relationships
50 under California Rules of Court, rule 5.210(h)(10), (h)(12);

51
52 (3) To disclose any actual or potential conflicts of interest under California Rules
53 of Court, rule 5.220(h)(10);

54
55 (4) To interview the parties separately, ensure access to the most accurate
56 information, and protect the parties and children in cases involving allegations
57 of domestic violence as stated in Family Code sections 3113, 3181, 3192 and
58 California Rules of Court, rule 5.215;

59
60 (5) For the court-appointed counsel for a child to interview mediators and perform
61 his or her other duties under Family Code section 3151(c)(5), or as expressly
62 authorized by the court; and

63
64 (6) To inform the court of the mediator's or evaluator's belief that a restraining
65 order is necessary to prevent an imminent risk to the physical safety of the
66 child or party.

67
68 **(g) [Exception for mandated duties and responsibilities]** This rule does not prohibit
69 ex parte communication for the purpose of fulfilling the duties and responsibilities:

70
71 (1) a mediator or evaluator may have as a mandated reporter of suspected child
72 abuse;

73
74 (2) a mediator or evaluator may have to warn of a threatened violent behavior
75 against a reasonably identifiable victim or victims;

76
77 (3) the court may have to investigate complaints.
78

BILL NUMBER: SB 1088 CHAPTERED
BILL TEXT

CHAPTER 489
FILED WITH SECRETARY OF STATE OCTOBER 4, 2005
APPROVED BY GOVERNOR OCTOBER 4, 2005
PASSED THE SENATE AUGUST 29, 2005
PASSED THE ASSEMBLY AUGUST 25, 2005
AMENDED IN ASSEMBLY AUGUST 22, 2005
AMENDED IN ASSEMBLY JUNE 28, 2005
AMENDED IN ASSEMBLY JUNE 15, 2005
AMENDED IN SENATE MAY 10, 2005
AMENDED IN SENATE APRIL 25, 2005
AMENDED IN SENATE APRIL 18, 2005

INTRODUCED BY Senator Bowen
(Coauthors: Assembly Members Calderon and Lieber)

FEBRUARY 22, 2005

An act to amend Section 1818 of, and to add Section 216 to, the Family Code, relating to family law.

LEGISLATIVE COUNSEL'S DIGEST

SB 1088, Bowen Family law: motions and orders.

Existing law prohibits ex parte communications involving certain administrative proceedings.

This bill would prohibit, in the absence of a stipulation to the contrary, ex parte communications between court-appointed or court-connected mediators or evaluators and the court, and between court-appointed or court-connected mediators or evaluators and any party or any attorney for a party to an action, except as specified. The bill would provide specified exceptions from these provisions. The bill would require the Judicial Council to adopt a related rule of court by July 1, 2006.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 216 is added to the Family Code, to read:

216. (a) In the absence of a stipulation by the parties to the contrary, there shall be no ex parte communication between the attorneys for any party to an action and any court-appointed or court-connected evaluator or mediator, or between a court-appointed or court-connected evaluator or mediator and the court, in any proceedings under this code, except with regard to the scheduling of appointments.

(b) There shall be no ex parte communications between counsel appointed by the court pursuant to Section 3150 and any court-appointed or court-connected evaluator or mediator, except where it is expressly authorized by the court or undertaken pursuant to paragraph (5) of subdivision (c) of Section 3151.

(c) Subdivisions (a) and (b) shall not apply in the following situations:

(1) To allow a mediator or evaluator to address a case involving allegations of domestic violence as set forth in Sections 3113, 3181, and 3192.

(2) To allow a mediator or evaluator to address a case involving allegations of domestic violence as set forth in the California Rules of Court 5.215.

(3) If the mediator or evaluator determines that ex parte communication is needed to inform the court of his or her belief that a restraining order is necessary to prevent an imminent risk to the physical safety of the child or the party.

(d) Nothing in this section shall be construed to limit the responsibilities a mediator or evaluator may have as a mandated reporter pursuant to Section 11165.9 of the Penal Code or the responsibilities a mediator or evaluator may have to warn under *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, *Hedlund v. Superior Court* (1983) 34 Cal.3d 695, and Section 43.92 of the Civil Code.

(e) The Judicial Council shall, by July 1, 2006, adopt a rule of court to implement this section.

SEC. 2. Section 1818 of the Family Code is amended to read:

1818. (a) All superior court hearings or conferences in proceedings under this part shall be held in private and the court shall exclude all persons except the officers of the court, the parties, their counsel, and witnesses. The court shall not allow ex parte communications, except as authorized by Section 216. All communications, verbal or written, from parties to the judge, commissioner, or counselor in a proceeding under this part shall be deemed to be official information within the meaning of Section 1040 of the Evidence Code.

(b) The files of the family conciliation court shall be closed. The petition, supporting affidavit, conciliation agreement, and any court order made in the matter may be opened to inspection by a party or the party's counsel upon the written authority of the judge of the family conciliation court.